STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 27, 2007
v	No. 265417 Macomb Circuit Court
EARL HICKERSON Defendant-Appellant.	LC No. 2004-003514-FC

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant was charged with kidnapping, MCL 750.349, assault with intent to commit criminal sexual conduct involving sexual penetration (AWICSC), MCL 750.520g(1), and third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b). A jury convicted him of AWICSC and CSC III. The trial court sentenced defendant, as an habitual offender, fourth offense, MCL 769.12, to concurrent sentences of 290 months to 50 years' imprisonment. Defendant appeals as of right his conviction of CSC III and his sentences. We affirm.

In the early morning of August 28, 2003, defendant drove the complainant, in a Blazer belonging to the complainant's mother, to several houses in Detroit in order to buy drugs. The complainant testified that, on the way back to Saint Clair Shores, defendant pulled his pants down and ordered the complainant to suck his penis. When she refused, defendant grabbed her hair and forced her head down to "his private area." She then swung her arm at defendant, and defendant let go of her hair. Defendant continued to drive and the complainant told defendant that she would do what he wanted if he would let her go. Defendant parked the vehicle on a side street. Complainant attempted to get out of the Blazer, but defendant pulled her back into the vehicle and started to drive again. She again offered to perform oral sex if defendant agreed to let her go. After defendant stopped the vehicle, the complainant leaned down and bit defendant's penis as hard as she could, in order to cause him disabling pain. There was blood everywhere. Defendant testified that the complainant was herself trying to buy drugs, that there was no oral sex, and that the blood in the car was the result of his being attacked by persons at one of the drug houses.

Defendant first asserts that he was denied his right to due process when the prosecutor failed to provide him with a photograph of the exterior of the Blazer's driver's side door, and eleven pages of discovery material, including defendant's alleged statement to a Saint Clair Shores police officer. We disagree.

Defendant asserts that the photograph constituted exculpatory evidence because it would have revealed the presence of someone else's blood and fingerprints on the driver's side door, which would have supported his testimony that he fought three men in the early morning of August 28. We review a trial court's decision on a discovery question for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). An abuse of discretion occurs when the trial court fails to select a principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Although there is no general constitutional right to discovery in a criminal case, *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000), a defendant does have a due process right to exculpatory information possessed by the prosecution, *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992), citing *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). In the present case, there is no evidence that the prosecution suppressed the photograph of the exterior of the Blazer's driver's side door. When the issue of the missing photograph arose, defense counsel informed the trial court that, according to defendant, former defense counsel, at some point in time, had the photograph in his possession. Defendant stated that former defense counsel had the photograph in his possession at the preliminary examination. Accordingly, because former defense counsel had the photograph in his possession, the prosecution never suppressed the photograph. Further, the only evidence that such a photograph exists is defendant's assertion. The prosecutor was unaware of its existence, and the detective who was the custodian of the original photographs stated that there is no negative of such a photograph. The trial court did not abuse its discretion in denying defendant's motion to quash and dismiss on this basis.

Defendant also claims that he was denied his right to due process when the prosecutor failed to provide him with the last eleven pages of the discovery packet. These eleven pages included Officer Rice's written summary of his telephone conversation with defendant. We first observe that Rice's written statement was not exculpatory evidence. Because Rice's written statement was not exculpatory evidence, the trial court did not err in denying defendant a new trial for the prosecution's alleged failure to provide him with the last eleven pages of the discovery packet. Second, defendant did not establish that the prosecutor failed to provide the last eleven pages of the packet. Rather, it appears that the material was provided to former counsel, who neglected to provide it to substitute counsel. Finally, defendant's argument that he should have been permitted to give surrebuttal testimony in response to Rice's account of his statement is unsupported by a request below to be permitted to present such testimony.

Defendant next asserts that his conviction of CSC III is not supported by sufficient evidence. When reviewing the sufficiency of the evidence to sustain a conviction, we "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

Defendant and plaintiff agree that, in order for us to affirm defendant's conviction of CSC III, the complainant's act of biting defendant's penis must constitute fellatio. Fellatio requires the entry of a penis into another person's mouth. *People v Reid*, 233 Mich App 457, 480; 592 NW2d 767 (1999). While the complainant testified that some portion of defendant's penis was not in her mouth when she bit defendant's penis, she later testified that she was sure she bit defendant's penis because it was in her mouth. The complainant further testified that she

felt defendant's penis between her upper and lower teeth. Viewing the complainant's testimony in the light most favorable to the prosecution, *Hunter, supra* at 6, a rational trier of fact could find that defendant's penis entered the victim's mouth to at least the inside of her teeth. Because "[a]ny penetration, no matter how slight, is sufficient to satisfy the 'penetration' element of third-degree CSC," *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993), we conclude that defendant's conviction is supported by sufficient evidence.

We also reject defendant's argument that, because there was no oral stimulation of his penis, there was no act of fellatio. CSC requires proof of sexual penetration. MCL 750.520d(1). Sexual penetration can be for any purpose. *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). Because sexual penetration can be done for any purpose, it is irrelevant whether defendant was actually stimulated by the penetration or whether the complainant intended to stimulate defendant. Because defendant's penis entered the complainant's mouth, there was an act of fellatio. *Reid, supra* at 480. Lastly, there was sufficient evidence to concluded that the complainant's offer to perform oral sex in exchange for her release, and her conduct in putting her mouth on defendant's penis, were not voluntary, but were the product of force or coercion.

Defendant also claims that the trial court erred in scoring fifteen points for offense variable (OV) 8, MCL 777.38, because the jury found him not guilty of kidnapping, and there were no facts on which to base the score. We review a trial court's scoring decision for an abuse of discretion. *People v Cox*, 268 Mich App 440, 453-454; 709 NW2d 152 (2005). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We will uphold a scoring decision "for which there is any evidence in support." *Cox, supra* at 454.

Fifteen points may be scored for OV 8 if the "victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). The victim's testimony that defendant did not permit her to leave the car, and instead pulled her back in and continued to drive, is sufficient to support the trial court's scoring of the variable. Further, defendant acknowledges that our Supreme Court has held that *Blakely v Washington*, 542 US 296, 301-302; 124 S Ct 2531; 159 L Ed 2d 403 (2004), does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 163-164; 715 NW2d 778 (2006). Thus, we find no error in the trial court's scoring fifteen points for OV 8.

Finally, defendant claims that he is entitled to be resentenced on his AWICSC conviction because his minimum sentence of 290 months' imprisonment does not fall within the recommended minimum sentence range under the legislative guidelines. When a defendant is sentenced to concurrent sentences for multiple convictions, an SIR is only required to be prepared for the highest class conviction. *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005). Because the lesser class conviction is not scored under the legislative guidelines, the guidelines are inapplicable to the lesser class conviction. *Id.* at 128-130. Defendant received concurrent sentences for his convictions of CSC III, a class B crime, MCL 777.16y, and of AWICSC, a class D crime, MCL 777.16y. Because AWICSC was not the highest class crime of which defendant was convicted, the legislative guidelines were inapplicable to his sentence for the AWICSC conviction. *Mack, supra*. Accordingly,

defendant's argument that he is entitled to be resentenced within the recommended sentence range under the legislative guidelines on his AWICSC conviction is without merit.

Affirmed.

/s/ Donald S. Owens
/s/ Janet T. Neff
/s/ Helene N. White